

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

CASE NO. CR19-0093JLR

**Plaintiff,**

# ORDER ON MOTIONS IN *LIMINE*

DWAYNE BROOKS,

Defendant.

## I. INTRODUCTION

Before the court are Defendant Dwayne Brooks’ and Plaintiff United States of America’s (the “Government”) motions *in limine*. (Def. MIL (Dkt. # 31); Gov’t MIL (Dkt. # 32).) The Government filed a response to Mr. Brooks’ motions *in limine* (Gov’t Resp. (Dkt. # 33)), but Mr. Brooks did not file an opposition to the Government’s motion *in limine* (*see generally* Dkt.). The court has considered the parties’ submissions, the relevant portions of the record, and the applicable law. Being fully advised, the court

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1 DENIES the Government's motion *in limine* without prejudice and GRANTS in part and  
2 DENIES in part Mr. Brooks' motions *in limine* as more fully discussed below.

3 **II. ANALYSIS**

4 **A. The Government's Motion *In Limine***

5 The Government moves to admit redacted log entries from Alaska USA Federal  
6 Credit Union ("Alaska USA"). (*See* Gov't MIL at 1; Log Entries (Dkt. # 32-2).) The log  
7 entries memorialize statements from Alaska USA employees and Mr. Brooks made  
8 during phone calls between Mr. Brooks and Alaska USA employees. (*See* Log Entries.)  
9 The Government represents that it has subpoenaed an Alaska USA records custodian who  
10 will testify that "the log entries were made and kept in the regular course of the bank's  
11 business and that the entries were made at or near the time by the bank employees with  
12 knowledge" and two former Alaska USA employees who had conversations with Mr.  
13 Brooks and made the log entries. (Gov't MIL at 2.) The Government did not submit an  
14 affidavit or declaration from this records custodian in support of its motion. (*See* Mot.)

15 The court DENIES the Government's motion WITHOUT PREJUDICE to  
16 presentation at trial. The court agrees with the Government that the redacted log entries  
17 could be admitted as business records under Federal Rule of Evidence 803(6) if the  
18 Government lays the appropriate foundation. (*See* Mot. at 3-4.) The court also agrees  
19 with the Government that Mr. Brooks' statements in the log do not meet the definition of  
20 hearsay. (*See id.*) However, the court will not admit the log entries until the Government  
21 presents an adequate foundation at trial.

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1      **B.      Mr. Brooks' Motions *In Limine***

2      Mr. Brooks' motions *in limine* seek to exclude evidence of a number of "other  
3      acts" that the Government alleges Mr. Brooks committed and any summary charts related  
4      to those other acts. (See Def. MIL.) Mr. Brooks argues that evidence relating to these  
5      other acts "goes far beyond the specific activity charged in the Indictment" and, as such,  
6      is not relevant, unduly prejudicial, and improper character evidence under Rules 401,  
7      403, and 404. (See Def. MIL at 1-4.) The court first addresses the applicable legal  
8      standard under those rules before turning to each of the acts at issue.

9      1.      Legal Standard

10     Rule 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a  
11    fact more or less probable than it would be without further evidence; and (b) the fact is of  
12    consequence in determining the action." Fed. R. Evid. 401. Evidence must be relevant to  
13    be admissible. Fed. R. Evid. 402.

14     Under Rule 404(b)(1), "[e]vidence of a crime, wrong, or other act is not  
15    admissible to prove a person's character in order to show that on a particular occasion the  
16    person acted in accordance with the character." Fed. R Evid. 404(b)(1). The Ninth  
17    Circuit has recently reiterated, however, that "Rule 404(b) applies solely to evidence of  
18    'other' acts, not to evidence of the very acts charged as crimes in the indictment." *United*  
19    *States v. Loftis*, 843 F.3d 1173, 1176 (9th Cir. 2016). Moreover, it is well-settled that  
20    "evidence should not be considered 'other crimes' or 'other act' evidence within the  
21    meaning of Rule 404(b) if 'the evidence concerning the "other" act and the evidence  
22    concerning the crime charged are inextricably intertwined.'" *United States v. Dorsey*,

1 677 F.3d 944, 951 (9th Cir. 2012) (quoting *United States v. Soliman*, 813 F.2d 277, 279  
2 (9th Cir. 1987)). The Ninth Circuit has applied the “inextricably intertwined” doctrine in  
3 two categories of cases: (1) where the other act “constitutes a part of the transaction that  
4 serves as the basis for the criminal charge,” and (2) where it was necessary to admit the  
5 other act evidence “in order to permit the prosecutor to offer a coherent and  
6 comprehensible story regarding the commission of the crime.” *Loftis*, 843 F.3d at 1178  
7 (citations omitted).

8 Even where a party seeks to offer other act evidence and the inextricably  
9 intertwined exception does not apply, other act evidence may still be admissible to prove  
10 “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake,  
11 or lack of accident.” Fed. R. Evid. 404(b)(2). When evidence is offered under Rule  
12 404(b)(2), “[t]he test for admitting such evidence is whether: ‘1) it tends to prove a  
13 material fact; 2) the prior act is not too remote in time; 3) the evidence is sufficient to  
14 support a finding that the defendant committed the act; and 4) where knowledge and  
15 intent are at issue, the act is similar to that charged.’” *United States v. Hanson*, 936 F.3d  
16 876, 882 (9th Cir. 2019) (quoting *United States v. Tsinnijinnie*, 91 F.3d 1285, 1288-89  
17 (9th Cir. 1996)).

18 Finally, under Rule 403, the court has discretion to exclude relevant evidence if its  
19 probative value is “substantially outweighed by a danger of . . . unfair prejudice,  
20 confusing the issues, misleading the jury, undue delay, wasting time, or needlessly  
21 presenting cumulative evidence.” Fed. R. Evid. 403.

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1      2.      Specific Other Acts

2            a.      *Subaru Thefts and Related Statements*

3            The court DENIES Mr. Brooks' motion to exclude evidence regarding Mr.  
4            Brooks' alleged thefts of a Subaru belonging to Roger Rotermund. (See Def. MIL at 4.)  
5            Evidence relating to the Subaru thefts is not evidence of "other" acts under Rule 404(b).  
6            The indictment alleges that Mr. Brooks' scheme to commit bank fraud involved  
7            unlawfully obtaining debit cards, credit cards, and other identity information "through  
8            various illegal means, including mail theft, car prowling, and burglary." (See Indictment  
9            (Dkt. # 1) ¶¶ 1-3.) As part of that scheme, the Government alleges that Mr. Brooks stole  
10            Mr. Rotermund's Subaru and found a purse belonging to Susan Ash in the vehicle.  
11            (Gov't Tr. Br. (Dkt. # 21) at 2-3.) That purse had Ms. Ash's debit card and other identity  
12            information in it, and a number of the counts charged against Mr. Brooks relate to his use  
13            of Ms. Ash's debit card and identity information. (See Gov't Resp. at 5.) Thus, Mr.  
14            Brooks' thefts of the Subaru are part of the Government's charges against Mr. Brooks,  
15            which renders Rule 404(b) inapplicable. *See Loftis*, 843 F.3d at 1177. Additionally, this  
16            evidence is "inextricably intertwined" with the evidence relating to the crimes charged  
17            against Mr. Brooks, *see id.* at 1177-78; and would be admissible under Rule 404(b)(2)  
18            even if the evidence was other acts evidence for the listed purposes of opportunity, plan,  
19            and identity. *See Fed. R. Evid. 404(b)(2).*

20            The court will not exclude evidence of the car thefts under Rule 403. To exclude  
21            evidence under Rule 403, the undue prejudice resulting from the admission of the  
22            evidence must "substantially outweigh" its probative value. Fed. R. Evid. 403. Here, the

probative value of Mr. Brooks' Subaru theft far outweighs the danger of any unfair prejudice to Mr. Brooks. Thus, the court will not exclude this evidence as unduly prejudicial.

Finally, the court notes that Mr. Brooks raises vague hearsay objections to the Government's introduction of statements from Mr. Rotermund about the car thefts. (See Def. MIL at 4.) It is not clear what specific statements Mr. Brooks seeks to exclude or whether the Government intends to offer those statements. (See *id.*) Consequently, the court lacks sufficient information to rule on the portion of Mr. Brooks' motion. Accordingly, the court DENIES Mr. Brooks' motion WITHOUT PREJUDICE to re-raising his hearsay objections at trial, if appropriate.

*b. Handwritten Note Listing Criminal Cases*

The court DENIES Mr. Brooks' motion to exclude a handwritten note found in the Subaru with information relating to Mr. Brooks' unrelated Renton Municipal Court cases. (See Def. MIL at 5.) As noted above, the theft of the Subaru is not an "other" act because the theft of that car is part of the alleged scheme to defraud Ms. Ash. *See supra* § II.B.2.a. Additionally, that car theft is "inextricably intertwined" with the charges against Mr. Brooks. *See id.* The note that law enforcement found within the Subaru listing criminal cases that Mr. Brooks was a party to is a crucial piece of evidence tying Mr. Brooks to the theft of the vehicle and the theft of Ms. Ash's items. Thus, the note—like the Subaru theft itself—is not other act evidence, *see Loftis*, 843 F.3d at 1177; it is inextricably intertwined with the crimes charged, *see id.* at 1177-78; and it is admissible

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1 under Rule 404(b)(2) for a number of the listed purposes, including identity and  
2 opportunity, *see* Fed. R. Evid. 404(b)(2).

3 The court will also not exclude this evidence under Rule 403. The note is highly  
4 probative, and the Government’s offer to use a redacted copy of the note that scrubs  
5 reference to the criminal nature of Mr. Brooks’ other cases or to stipulate that Mr. Brooks  
6 was a named party to the cases listed on the note cures any unfair prejudice. (*See* Gov’t  
7 Resp. at 6); Fed. R. Evid. 403.

8                   c.     *Stolen Mail Found in the Subaru*

9 The court DENIES Mr. Brooks’ motion to exclude evidence that stolen mail was  
10 recovered from the Subaru. (*See* Def. MIL at 5.) The indictment alleges that mail theft is  
11 one of the means through which Mr. Brooks stole access devices and identity  
12 information. (*See* Indictment (Dkt. # 1) ¶¶ 1-3.) The Government also intends to argue  
13 that Mr. Brooks stole mail from four of the specific victims that the Government’s  
14 case-in-chief will focus on—Ms. Ash, Jean Dobbs, Darren Hostenske, and Julie  
15 Hostenske—and that Mr. Brooks used the items obtained from the stolen mail to commit  
16 bank fraud. (*See* Gov’t Resp. at 6.) Thus, the Government argues that any evidence of  
17 mail theft should be admitted because mail theft was “an essential part of [Mr. Brooks’]  
18 fraud scheme.” (*See id.*)

19 The court first concludes that the evidence of stolen mail in the Subaru is “other”  
20 acts evidence subject to the restrictions of Rule 404(b)(1). The Government argues that  
21 *any* evidence suggesting that Mr. Brooks possessed stolen mail—regardless of  
22 circumstances—cannot constitute “other” acts under Rule 404(b)(1) because mail theft

1 was part of Mr. Brooks’ scheme to commit bank fraud. (See Gov’t Resp. at 6.) The court  
2 rejects that argument. *Loftis* is instructive on this point. The *Loftis* defendant was  
3 charged with five counts of wire fraud relating to “a broad scheme to defraud” through  
4 the defendant’s false representations about his oil business. 843 F.3d at 1175. The five  
5 counts in the indictment related to specific wire transfers from specific victims, but the  
6 government sought to admit evidence of additional victims and additional wire transfers  
7 that related to the same fraudulent scheme. *See id.* The Ninth Circuit noted that, because  
8 the crime of wire fraud “includes not only the specific executions of the scheme alleged  
9 . . . but also the overall scheme alleged,” the uncharged transactions “are part of the  
10 charged offense—the fraudulent scheme as a whole—not ‘other’ crimes or ‘other’ acts  
11 evidence.” *See id.* at 1177.

12 Unlike the uncharged transactions in *Loftis* that all related to the defendant’s  
13 specific scheme to defraud investors with false representations about an oil business, *see*  
14 *id.* at 1175, here, evidence showing that Mr. Brooks possessed stolen mail could be  
15 related to any number of criminal schemes—many of which could have nothing to do  
16 with bank fraud. The court will not give the Government free reign to bypass Rule  
17 404(b)(1)’s restrictions on propensity evidence without some showing that the stolen mail  
18 at issue relates to his scheme to commit bank fraud. The six counts of bank fraud in the  
19 indictment require the Government prove that Mr. Brooks carried out “a scheme or plan”  
20 to obtain money from a financial institution by making false statements or promises. *See*  
21 Ninth Circuit Manual of Model Criminal Jury Instructions No. 8.127 (2010). If the  
22 Government wants to admit evidence that Mr. Brooks possessed stolen mail without

1 triggering Rule 404(b)(1)'s restrictions, it must do more to connect that stolen mail to Mr.  
2 Brooks' specific scheme to defraud financial institutions than merely allege that part of  
3 Mr. Brooks' scheme involved stealing mail.<sup>1</sup> (See Gov't Resp. at 6.) Because the  
4 Government has not made such a showing with regard to the stolen mail found in the  
5 Subaru, the court finds that Mr. Brooks' alleged possession that mail constitutes "other"  
6 acts evidence under Rule 404(b)(1).

7       Although Rule 404(b)(1) applies, the court concludes that evidence of the stolen  
8 mail in the Subaru is still admissible. Under Rule 404(b)(2), evidence showing that  
9 stolen mail was found in the Subaru can be offered for the non-propensity purposes of  
10 showing Mr. Brooks' plan, knowledge, absence of mistake, and *modus operandi*. Fed. R.  
11 Evid. 404(b)(2). Also, the court will not exclude this evidence under Rule 403 because  
12 the danger of unfair prejudice or confusion to the jury presented by this evidence does not  
13 substantially outweigh its probative value. Fed. R. Evid. 403.

14                   d.     *Uncharged Money Order Purchases with Ms. Ash's Debit Card*

15       The court DENIES Mr. Brooks' motion to exclude evidence of money order  
16 transactions made with Ms. Ash's debit card that the Government has not alleged in the  
17 indictment. (See Def. MIL at 5.) Although the Government has not charged Mr. Brooks  
18 with a different count of bank fraud for every alleged money order transaction made with  
19 Ms. Ash's debit card, evidence of these transactions does not constitute "other" acts  
20 evidence. Unlike the evidence showing that Mr. Brooks possessed stolen mail that was

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<sup>1</sup> For similar reasons, the court is unable to conclude that the stolen mail found in the  
Subaru is inextricably intertwined with the conduct charged in the indictment.

1 potentially unrelated to Mr. Brooks' bank fraud, *see supra* § II.B.2.c, evidence of Mr.  
2 Brooks' uncharged money order transactions using Ms. Ash's debit card specifically  
3 relates to Mr. Brooks' "fraudulent scheme as a whole" and is thus not "other" acts  
4 evidence. *See Loftis*, 843 F.3d at 1177. Additionally, as the *Loftis* court noted, these  
5 kinds of uncharged transactions also fall under the inextricably intertwined exception.  
6 *See id.* at 1178. The court also agrees with the Government that the uncharged  
7 transactions would be admissible under Rule 404(b)(2) to show intent, opportunity,  
8 identity, knowledge, absence of mistake, and plan. *See Fed. R. Evid. 404(b)(2).*

9 The court will not exclude this evidence under Rule 403. This evidence is highly  
10 probative, and the court rejects Mr. Brooks' argument that admitting the evidence of the  
11 money orders would be a waste of time. (*See* Def. MIL at 5); Fed. R. Evid. 403.

12       e.     *Mr. Brooks' DUI Arrest and Property Found During the Arrest*

13 The court GRANTS in part and DENIES in part Mr. Brooks' motion to exclude  
14 evidence of his January 2018 arrest for driving under the influence ("DUI") and certain  
15 items found during that arrest. (*See* Def. MIL at 6.) The fact that Mr. Brooks was  
16 arrested for a DUI is "other" acts evidence under Rule 404(b)(1), it is not inextricably  
17 intertwined with the conduct charged in the indictment, and its admission would be  
18 substantially more prejudicial than probative. *See Fed. R. Evid. 403, 404(b).*  
19 Accordingly, the court grants Mr. Brooks' motion in part and excludes all reference to the  
20 fact that Mr. Brooks was arrested for a DUI. The court agrees with the Government,  
21 however, that "some context must be provided for the jury to explain how the  
22 [G]overnment came into possession of crucial pieces of evidence" found inside the

1 vehicle Mr. Brooks was driving. (Gov't Resp. at 7.) To allow the Government to  
2 provide this context without prejudicing Mr. Brooks, the court adopts the solution  
3 proposed by Mr. Brooks: "The defense would not object to the [G]overnment  
4 introducing that the cards and pendant were found with Mr. Brooks when he was arrested  
5 (leaving the jury to presume it was for the charged conduct), leaving out the  
6 circumstances of the arrest." (Def. MIL at 6.) The Government may inform the jury that  
7 Mr. Brooks was arrested in a vehicle in January 2018, in Pierce County, and that certain  
8 items were found in that vehicle, but it may not discuss the nature of the arrest.

9                   The court denies Mr. Brooks' motion to the extent that he seeks to exclude  
10 evidence of items found within the car that belong to individuals other than Ms. Ash.  
11 (See *id.*) Like the evidence of stolen mail in the Subaru, evidence showing that Mr.  
12 Brooks possessed access devices belonging to other victims shows Mr. Brooks' plan,  
13 knowledge, absence of mistake, and *modus operandi* under Rule 404(b)(2), and the  
14 evidence is not substantially more prejudicial than probative under Rule 403. *See* Fed. R.  
15 Evid. 403, 404(b)(2).

16                   *f.        Mr. Brooks' Facebook Picture*

17                   The court DENIES Mr. Brooks' motion to exclude the photograph found on his  
18 Facebook account that depicts him wearing a gold chain and pendant. (See Def. MIL at  
19 6.) Mr. Brooks argues that this photograph is unfairly prejudicial and should be excluded  
20 under Rule 403. (See *id.*); Fed. R. Evid. 403. The court disagrees. Count 6 of the  
21 indictment charges Mr. Brooks with using Ms. Ash's credit card to purchase the gold  
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1 chain and pendant that Mr. Brooks is wearing in the photograph. Thus, the photograph is  
2 highly probative and directly related to the charges in count 6 in the indictment. To the  
3 extent that there is any unfair prejudice from the photograph, the court finds that the  
4 Government's proposed redactions (*see* Gov't Resp., Ex. C) cure that prejudice.

g. *Surveillance Video from Ms. Ash's Condominium*

6 The court DENIES Mr. Brooks' motion to exclude video clips from the  
7 surveillance cameras at Ms. Ash's condominium. (See Def. MIL at 7.) Ms. Ash will be a  
8 central figure in the Government's case-in-chief. (See Gov't Tr. Br. at 2-8.) Counts 4-6,  
9 8, and 10 in the indictment relate to Mr. Brooks' theft and use of Ms. Ash's identity and  
10 access devices. (See Indictment ¶¶ 11, 15, 17.) Thus, surveillance footage from Ms.  
11 Ash's apartment showing someone entering Ms. Ash's condominium using Ms. Ash's  
12 key fob and taking bags and mail from Ms. Ash and other condominium residents is not  
13 "other" acts evidence and is admissible under *Loftis* and the inextricably intertwined  
14 exception to Rule 404(b)(1). See *Loftis*, 843 F.3d at 1177-78. Moreover, even if this  
15 video did constitute "other" acts evidence under Rule 404(b)(1), the court would admit  
16 this evidence under Rule 404(b)(2). See Fed. R. Evid. 404(b)(2). The court will also not  
17 exclude this evidence under Rule 403 because the probative value of the evidence is not  
18 substantially outweighed by the unfair prejudice that would result from its admission.

19 | *See Fed. R. Evid. 403.*

20 To the extent that Mr. Brooks' argument is that the video footage is irrelevant  
21 because the man shown in the surveillance footage is not Mr. Brooks (*see* Def. MIL at 7),  
22 the court rejects that argument. Either the man in the video is Mr. Brooks and the

1 evidence is helpful to the Government's case or the man in the video is not Mr. Brooks  
2 and the evidence is helpful to Mr. Brooks' case. Regardless of which conclusion the jury  
3 ultimately reaches, evidence showing someone breaking into Ms. Ash's home and taking  
4 her possessions is highly relevant given that she will be a central figure in the  
5 Government's case-in-chief.

*h. Bags and Power of Attorney Form from Gary Gill*

7 The court DENIES Mr. Brooks' motion to exclude the bags and unsigned power  
8 of attorney form that Gary Gill provided to law enforcement officers. (See Def. MIL at  
9 7.) Mr. Brooks lived with Mr. Gill for two months and the Government claims that the  
10 30 bags that Mr. Gill delivered to law enforcement belonged to Mr. Brooks and contained  
11 stolen mail. (See Gov't Resp. at 9; Def. MIL at 7.) Evidence of stolen mail in these bags  
12 is admissible under Rule 404(b)(2) for the same reasons that the evidence of stolen mail  
13 found in the Subaru and in the car Mr. Brooks was driving during his DUI arrest is  
14 admissible. *See supra* § II.B.2.c, e; *see also* Fed. R. Evid. 404(b)(2). The power of  
15 attorney form that Mr. Gill turned over to law enforcement listed Ms. Ash granting power  
16 of attorney to Mr. Brooks. (See Def. MIL at 7.) Thus, possession of this form is not an  
17 “other” act and is admissible under *Loftis* as part of Mr. Brooks’ scheme to defraud  
18 related to Ms. Ash, *see Loftis*, 843 F.3d at 1177; possession of the form is inextricably  
19 intertwined with the conduct charged in the indictment, *see id.* at 1177-78; and the form  
20 is admissible under Rule 404(b)(2) to show plan, opportunity, preparation, intent,  
21 identity, and absence of mistake, *see Fed. R. 404(b)(2)*. So long as the Government lays

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sufficient foundation to show that Mr. Brooks possessed the power of attorney form, the fact that the form is unsigned has no bearing on its admissibility.

*i. Uncharged Fraudulent Checks Deposited Into Mr. Brooks' Bank Account*

The court DENIES Mr. Brooks' motion to exclude evidence related to stolen checks deposited into Mr. Brooks' bank account that are not part of the charges in the indictment. (*See* Def. MIL at 7-8.) The indictment alleges that part of Mr. Brooks' fraudulent scheme involved obtaining stolen checks and money orders and altering, forging, and falsely endorsing those checks to himself. (*See* Indictment ¶¶ 7-10.) Count 3 of the indictment specifically charges Mr. Brooks with bank fraud based on his deposit of a check stolen from Mr. Hostenske and Ms. Hostenske into Mr. Brooks' Alaska USA account. (*See* Indictment ¶ 11.) Thus, evidence that other uncharged stolen checks were deposited into Mr. Brooks' Alaska USA account is evidence of Mr. Brooks' "fraudulent scheme as a whole" and is thus admissible. *See Loftis*, 843 F.3d at 1177. This evidence is also inextricably intertwined with the conduct charged in the indictment, *see id.* at 1177-78; and is admissible under Rule 404(b)(2) for the enumerated purposes of intent, knowledge, identity, plan, and absence of mistake, *see* Fed. R. Evid. 404(b)(2).

The court will not exclude this evidence under Rule 403. The prejudicial impact of this evidence does not substantially outweigh its probative value. *See* Fed. R. Evid. 403.

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j. *Uncharged Expenses on Ms. Dobbs' Discover Accounts*

The court DENIES Mr. Brooks’ motion to exclude evidence related to alleged fraudulent transactions made using Ms. Dobbs’ Discover accounts. (See Def. MIL at 8.) Counts 1 and 2 of the indictment allege that Mr. Brooks committed bank fraud by using Ms. Dobbs’ Discover accounts to make and attempt to make cash withdrawals. (See Indictment ¶ 11.) Thus, evidence of other uncharged transactions using these same accounts is part of Mr. Brooks’ “fraudulent scheme as a whole” and is thus admissible. See *Loftis*, 843 F.3d at 1177. Count 7 of the indictment alleges that Mr. Brooks’ unauthorized use of Ms. Dobbs’ access devices constitutes access device fraud (see Indictment ¶ 13), and the charge of access device fraud requires that the Government show that Mr. Brooks incurred more than \$1,000 in fraudulent charges using the access devices in a one-year period. See Ninth Circuit Manual of Model Criminal Jury Instructions No. 8.85 (2010). Thus, evidence of “other expenses” is not “other” acts evidence under Rule 404(b)(1) because admission of this evidence goes directly to the Government’s burden of proof on the crimes charged. See Fed. R. Evid. 404(b)(1). Moreover, evidence showing that Mr. Brooks used Ms. Dobbs’ Discover accounts for uncharged transactions is inextricably intertwined with the crimes charged in the indictment and is admissible under Rule 404(b)(2) to show identity and opportunity. See *Loftis*, 843 F.3d at 1177-78; Fed. R. Evid. 404(b)(2).

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*k. Uncharged Fraudulent Activity Related to Ms. Dobbs' American Express and Fidelity Accounts*

The court DENIES Mr. Brooks' motion to exclude evidence related to his alleged use of Ms. Dobbs' American Express and Fidelity accounts. (*See* Def. MIL at 8.) Because the Government has not charged Mr. Brooks with bank fraud relating to Ms. Dobbs' American Express or Fidelity accounts, the court will not admit this evidence as part of Mr. Brooks' fraudulent scheme under *Loftis* or the inextricably intertwined exception. *See* 843 F.3d at 1177-78. However, counts 1 and 2 of the indictment allege that Mr. Brooks used Ms. Dobbs' Discover accounts to make and attempt to make cash withdrawals and count 9 alleges aggravated identity theft based on Mr. Brooks' use of Ms. Dobbs' access devices. (*See* Indictment ¶¶ 11, 16.) Thus, evidence showing that Mr. Brooks had access to Ms. Dobbs' American Express and Fidelity accounts or controlled those accounts is admissible under Rule 404(b)(2) to show identity, plan, knowledge, opportunity, *modus operandi*, and absence of mistake. *See* Fed. R. Evid. 404(b)(2).

## 1. *Summary Charts*

The court DENIES Mr. Brooks' motion to exclude summary charts. (See Def. MIL at 8.) The Government's trial brief states that the Government will offer a number of summary charts as evidence that summarizes Mr. Brooks' fraudulent transactions with different access devices. (See Gov't Tr. Br. at 17-19.) Mr. Brooks argues that any summary exhibits that address the uncharged conduct that Mr. Brooks seeks to exclude in his motions *in limine* should be excluded for the same reasons the underlying evidence should be excluded. (See Def. MIL at 8.) However, because the court denied Mr.

Brooks' motions to exclude the underlying evidence, it also denies his request to exclude the summary charts.

### 3. Limiting Instruction

Although Mr. Brooks did not request limiting instructions as an alternative to exclusion (*see generally* Def. MIL), the court recognizes that limiting instructions may be appropriate for some of the Rule 404(b)(2) evidence that the Government seeks to admit. *See* Fed. R. Evid. 105. Thus, to the extent that Mr. Brooks believes that a limiting instruction is warranted under Rule 105, he may request such an instruction at trial.

### III. CONCLUSION

For the reasons set forth above, the court rules on the Government's motion *in limine* (Dkt. # 32) and Mr. Brooks' motions *in limine* (Dkt. # 31) as follows:

- The Government's motion *in limine* to admit redacted log entries from Alaska USA is DENIED WITHOUT PREJUDICE;
- Mr. Brooks' motion to exclude evidence regarding Mr. Brooks' alleged thefts of a Subaru is DENIED;
- Mr. Brooks' motion to exclude hearsay statements from Mr. Rotermund regarding the theft of the Subaru is DENIED WITHOUT PREJUDICE;
- Mr. Brooks' motion to exclude a handwritten note found in the Subaru is DENIED;
- Mr. Brooks' motion to exclude evidence of money order transactions made with Ms. Ash's debit card that the Government has not alleged in the indictment is DENIED;

1           • Mr. Brooks' motion to exclude evidence of his January 2018 DUI arrest and  
2           certain items found during that arrest is GRANTED in part and DENIED in  
3           part;

4           • Mr. Brooks' motion to exclude the photograph found on his Facebook account  
5           that depicts him wearing a gold chain and pendant is DENIED;

6           • Mr. Brooks' motion to exclude video clips from the surveillance cameras at  
7           Ms. Ash's condominium is DENIED;

8           • Mr. Brooks' motion to exclude the bags and unsigned power of attorney form  
9           that Gary Gill provided to law enforcement officers is DENIED;

10           • Mr. Brooks' motion to exclude evidence related to stolen checks deposited into  
11           Mr. Brooks' bank account that are not part of the charges in the indictment is  
12           DENIED;

13           • Mr. Brooks' motion to exclude evidence related to alleged fraudulent  
14           transactions made using Ms. Dobbs' Discover accounts is DENIED;

15           • Mr. Brooks' motion to exclude evidence related to his alleged use of Ms.  
16           Dobbs' American Express and Fidelity accounts is DENIED; and

17           • Mr. Brooks' motion to exclude summary charts is DENIED.

18           Dated this 6th day of January, 2020.



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20           JAMES L. ROBART  
21           United States District Judge  
22